

FEDERAL CIRCUIT COURT OF AUSTRALIA

CEW18 v MINISTER FOR IMMIGRATION

[2020] FCCA 10

Catchwords:

MIGRATION – Review of decision of a delegate of the Minister that the applicant is an excluded fast track applicant – applicant found to have provided a bogus identity document – whether the finding was a jurisdictional fact considered - whether the delegate made irrational or illogical findings considered – no jurisdictional error established.

Legislation:

Migration Act 1958 (Cth), ss.5, 57, 91WA, 101, 108

Cases cited:

ADT16 v Minister for Immigration [2018] FCA 1198
AEK15 v Minister for Immigration (2016) 244 FCR 328
AIB16 v Minister for Immigration (2017) 254 FCR 457
ASF17 v Minister for Immigration [2018] FCA 1149
Ashraf v Minister for Immigration (2018) 261 FCR 97
Australian Postal Corporation v D’Rozario (2014) 222 FCR 303
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
AYZ18 v Minister for Home Affairs [2019] FCCA 2070
AZAFV v Minister for Immigration [2016] FCA 79
BGM16 v Minister for Immigration (2017) 252 FCR 97
BMK18 v Minister for Home Affairs [2019] FCA 189
BPC16 v Minister for Immigration [2018] FCA 920
BYE17 v Minister for Immigration [2019] FCA 441
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135
DAO16 v Minister for Immigration (2018) 258 FCR 175
DRP17 v Minister for Immigration [2018] FCA 523
Farah Corporations Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
George v Rockett (1990) 170 CLR 104
Gupta v Minister for Immigration [2017] FCAFC 172
Minister for Immigration v Brar (2012) 201 FCR 240
Minister for Immigration v DRP17 [2018] FCAFC 198
Minister for Immigration v Li (2013) 249 CLR 332
Minister for Immigration v Stretton (2016) 237 FCR 1
Minister for Immigration v SZJSS (2010) 243 CLR 164
Minister for Immigration v SZMDS (2010) 240 CLR 611
Minister for Immigration v SZVFW [2018] HCA 30
MZZYE v Minister for Immigration [2015] FCA 1378

NAHI v Minister for Immigration [2004] FCAFC 10
Re Minister for Immigration; Ex Parte Applicant S20/2002 (2003) 77 ALJR 1165
Schmidt v Minister for Immigration [2018] FCA 1162
SFGB v Minister for Immigration (2003) 77 ALD 402
SHJB v Minister for Immigration (2003) 134 FCR 43
Sun v Minister for Immigration (2016) 243 FCR 220
SZEEU v Minister for Immigration (2006) 150 FCR 214
SZUEP v Minister for Immigration [2017] FCAFC 94
Taulahi v Minister for Immigration (2016) 246 FCR 146
Transurban City Link Ltd v Allan (1999) 95 FCR 553
Vo v Minister for Home Affairs [2019] FACFC 108
VQAB v Minister for Immigration [2004] FCAFC 104

Applicant:	CEW18
Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
File Number:	SYG 786 of 2018
Judgment of:	Judge Driver
Hearing date:	9 December 2019
Date of last submission:	19 December 2019
Delivered at:	Sydney
Delivered on:	19 March 2020

REPRESENTATION

Counsel for the Applicant:	Mr N Poynder
Solicitors for the Applicant:	Ryburn Solicitors
Counsel for the Respondent:	Ms R Graycar
Solicitors for the Respondent:	HWL Ebsworth

ORDERS

- (1) The application as amended by leave granted on 9 December 2019 is dismissed.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 786 of 2018

CEW18

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant seeks judicial review of a decision of a delegate of the Minister (delegate) made on 7 February 2018. The delegate found that the applicant had provided a bogus document as evidence of his identity, nationality or citizenship and hence was an excluded fast track applicant under s.91WA of the *Migration Act 1958* (Cth) (Migration Act).
2. The issue in this case is whether the delegate erred by finding that a Taskera, or Afghan identity document, provided by the applicant was a bogus document, such that it rendered the applicant to be an “excluded fast track applicant” under s.5(1) and s.91W of the Migration Act.

3. The following statement of background facts is derived from the submissions of the parties.

Relevant facts

4. The applicant claims to be a citizen of Afghanistan. He first arrived in Australia at Christmas Island on 27 November 2012.¹ The applicant was subsequently relocated to Pontville, Tasmania, where he underwent an arrival interview on 22 January 2013.²
5. At his arrival interview the applicant provided as an identity document a Dari language Taskera issued in 2008.³ He told the interviewing officer that his name was MH⁴ and he was an ethnic Hazara born in the Ghazni province of Afghanistan.⁵ He stated that in 1996 his father took the family to Quetta, Pakistan, where they remained illegally until February 2012, although they also spent time living in Tehran, Iran.⁶ He stated that he was married in Quetta from 2010-2012 but was now divorced,⁷ and that he had two siblings then living in Quetta: a sister, MAZ (born 1982), and a brother, JH (born 1997).⁸
6. On 4 May 2016 the Minister “lifted the bar” under s.195A of the Migration Act to enable the applicant to lodge a valid application for a Safe Haven Enterprise Visa (SHEV).⁹
7. On 25 May 2016 the applicant, through his representative, lodged an application for a SHEV.¹⁰ Relevantly included with the application documents were:
 - a) a statutory declaration made by the applicant on 24 May 2016¹¹ in which he claimed protection as against Afghanistan because of his Hazara ethnicity and Shia religion and because of his father’s

¹ Court Book (CB) 48, questions 47-48

² CB 5-22

³ CB 1

⁴ CB 5; the name has been anonymised

⁵ CB 7

⁶ CB 7

⁷ CB 10

⁸ CB 12; the names have been anonymised

⁹ CB 23-24

¹⁰ CB 28-82

¹¹ CB 67-71

role as a former fighter against the Taliban. The applicant stated that he left Pakistan because of problems arising out of his forbidden marriage to a woman in Quetta; and

- b) a further copy of his Taskera in the Dari language, together with an English translation.¹²

8. On 19 April 2017 the applicant's representative provided a supplementary statutory declaration made by the applicant on 18 April 2017,¹³ in which he further explained his fear of returning to Afghanistan, and explained what had occurred in relation to his identity documents. Relevantly to the present case, the applicant at [6] said that his Taskera had been issued by the Afghanistan Ministry of Interior Affairs on 27 December 2010. He stated that his aunt's son, his cousin, had travelled from Quetta to Jaghori (in the Ghazni province of Afghanistan) to obtain the Taskera and bring it back to Quetta.

9. According to the decision of the delegate,¹⁴ the following took place at the interview on 27 April 2017:

- a) the applicant was asked about any relatives in Australia and he initially stated that he had a cousin who lived in Melbourne, but later he was shown photographs of two persons who he stated were his cousins. These were MQ and AM,¹⁵ the latter who the delegate stated was a citizen of Pakistan. The delegate suggested that the applicant was also a citizen of Pakistan and he denied this;
- b) the applicant was told that there were concerns that his Taskera was not genuine, given that he did not obtain this document himself. The applicant maintained that his Taskera was genuine. He stated that "there are people that if you pay ten thousand they organise your Taskera so that you can obtain it"¹⁶ which is what he did; and

¹² CB 72-73

¹³ CB 125-135

¹⁴ CB 1606-1607

¹⁵ The names have been anonymised

¹⁶ See CB 1609, dot point 4

- c) after a “natural justice break” the applicant apologised for not telling the truth initially as he was “tricked and given the wrong advice”. He stated that MQ was his brother. He also stated that he did not have a brother named JH, but that he had a brother named J.¹⁷ At the conclusion of the interview the applicant was requested to provide the complete details of his family.
10. On 10 May 2017 the representative provided a new statutory declaration made by the applicant on 9 May 2017.¹⁸ The applicant at [11] gave his correct list of siblings as follows:¹⁹
- S (sister - DOB 1981);
 - ML (brother - DOB 1983);
 - the applicant himself (DOB 1985);
 - MA (brother - DOB 1988);
 - MQ (brother - DOB 1994);
 - GA (sister - DOB 1996);
 - MJ (brother - DOB 1998); and
 - HA (brother - DOB 2009).
11. With regard to his Pakistani identity, the applicant at [25]-[34] stated that, when living in Pakistan as Afghan refugees, his father obtained fake Pakistani identities for the family. He stated he did not know how they were obtained. He said that “SA” was the name on his fake Pakistani identity. The applicant provided a notarised English version of a “Pakistani Form B” acquired by his father in 2005.²⁰ He noted that neither his sister S nor his brother HA were included on the Form B, since S was married by then and HA was not yet born. He noted that his younger brother MQ equated to a person called JA on the Form B,

¹⁷ The name has been anonymised

¹⁸ CB 791-796

¹⁹ The names have been anonymised

²⁰ CB 797. There is no Urdu version of the Form B in the Court Book. In the decision, at CB 1609, the delegate stated that the applicant had provided an “original Form B” and translation

and that AM (who had previously been identified as his cousin in the interview) was actually his brother, MA, who was sponsored to Australia under that name on a partner visa in 2015. He also noted that the extra child on the Form B did not exist, and that he did not know why his father had added that child. He said that the dates of birth on the Form B were also incorrect.

12. On 25 May 2017 the Minister's Department sent a letter requesting that the applicant provide the original of his Taskera.²¹ This was provided to the Minister's Department on 6 June 2017.²²
13. On 26 July 2017 the Minister's Department sent a letter inviting the applicant to respond to the following information, pursuant to s.57 of the Migration Act.²³

Afghan Taskera No. ...

From the evidence available to me I reasonably suspect you provided the Department with a bogus document as defined by s5(1)(b) of the Migration Act 1958.

...

The Taskera you submitted is suspected to be a bogus document as you did not obtain the Taskera yourself and you were not residing in Afghanistan when the Taskera was issued.

On the 6 June 2017 you submitted an original Certificate for Children below 18 years of age issued by the Government of Pakistan which lists your National Identity Card number. There is no information before the department to indicate that this Pakistan Certificate is a bogus document. This document indicates that you are a citizen or permanent resident of Pakistan.

If it is assessed that you have produced a bogus document as evidence of your identity, nationality or citizenship, then your visa application may be refused under section 91 WA(1) of the Migration Act.

²¹ CB 915-924

²² See CB 1065

²³ CB 1065-1069

14. On 9 August 2017 the representative sent an email to the Minister's Department attaching a statutory declaration made by the applicant on 8 August 2017.²⁴ The declaration relevantly stated:

- a) under the heading, "Genuine Afghani Identity", the applicant referred to an attached Taskera in the Dari language²⁵ for his father, MI,²⁶ who "is Afghan and he has an Afghan National Identity". The applicant also provided an English translation of the identification page of his father's Taskera.²⁷ The English translation of the identification page had a registration number and serial number which largely matched a reference to the father's records on the applicant's own Taskera;²⁸
- b) under the heading, "Non-Genuine Pakistani Identity", the applicant stated, at [4]-[6]:

When my father went to renew his fake Shinakhi Card in 2017 he was not able to renew it. Pakistani authorities asked him to bring his Brother. This Brother on his Shinakhti Card is not his real brother and he doesn't know him or how to find him. The fake Pakistani identity has lapsed and is no longer functioning.

Accordingly, any fake Pakistani identity of mine has lapsed also.

My father's Shinakhti card has in the past been renewed by way of payment of bribes and has not been renewable without such payment as it is bogus.

- c) the applicant went on, at [7]:

Growing up in Quetta, many Hazara families trying to make a life in Quetta purchased fake Pakistani identities in order to live. These identities have not been issued according to correct procedure and they are bogus. There was a large black market business for bogus Pakistani identities. Some individuals became extremely wealthy on the profits of their illegal endeavour. They were infamous in the community. Some of their names that I heard of were They were not prosecuted or brought down by Pakistani authorities. These identities were expensive. In Quetta,

²⁴ CB 1071-1086

²⁵ CB 1088-1096

²⁶ The name has been anonymised

²⁷ CB 1098

²⁸ At CB 72

most people are aware that Hazara do not have genuine Pakistani identities. I am sure that Australian authorities are fully aware of the details.

- d) the applicant stated that, given the possibility that he may be found to be Pakistani, “contrary to my understanding and statutory declaration evidence”, he would provide an outline of his fears with respect to Pakistan, which was set out in detail in the rest of the declaration.
15. On 17 August 2017 the Minister’s Department sent an email inviting the applicant to provide reasons why he could not safely relocate to other areas of Pakistan.²⁹ The applicant responded to this with a further statutory declaration made on 24 August 2017³⁰ stating that he would be unsafe anywhere in Pakistan.

The delegate’s decision³¹

16. Under the heading, “Identity Assessment”, the delegate referred to the information given at the arrival and SHEV interviews, and the applicant’s statutory declarations.
17. In relation to the applicant’s Taskera, the delegate at CB 1606 made the following finding:

I have assessed the Taskera to be a bogus document as the applicant did not obtain the Taskera himself and he was not residing in Afghanistan when the Taskera was issued. I do not find it plausible that the applicant would be able to obtain a genuine Taskera given that there is no country information which indicates that Afghan citizens can obtain Taskeras outside Afghanistan. I therefore place no weight on the applicant’s Taskera as evidence of his identity.

18. The statement of the delegate that “there is no country information which indicates that Afghan citizens can obtain Taskeras outside Afghanistan” was referenced by footnote 2, which identified the following country information:³²

²⁹ CB 1100

³⁰ CB 1101-1104

³¹ CB 1605-1630

³² The relevant country information has been provided by the respondent’s solicitor and was provided at the hearing

- a) “Afghanistan: Identity documents – Taskeras Whether available in Quetta, Pakistan”, Country of Origin Information Section (COIS), 22 December 2016 (the 2016 Australian Report); and
 - b) Department of Foreign Affairs and Trade (DFAT) Country Information Report – Afghanistan, 18 September 2017 (the 18 September 2017 DFAT Report).
19. In relation to the Pakistani “Form B”, the delegate at CB 1607 noted that these are also referred to as “Child Registration certificates” and, made the following findings:³³

There is no information before the department to indicate that the Pakistan Form B that the applicant provided is a bogus document. The fact that the applicant holds a Pakistan Form B indicates that he is a citizen of Pakistan and was born in Pakistan which is inconsistent with his claim to originate from a family of undocumented Afghan refugees in Pakistan.

...

The applicant’s Form B indicates that he was born in Quetta, resided at ..., Quetta and is a citizen of Pakistan. This combined with the fact that his brother is the holder of a Pakistan passport are strong indicators that the applicant is a Pakistan citizen who originates from the indigenous Hazara community in Quetta and not an undocumented Hazara refugee from Pakistan.

20. The delegate stated:³⁴

I place significant weight on the applicant’s Pakistan Form B, his previously undeclared Pakistan Identity Card and Brother’s Pakistan passport as evidence that the applicant is in fact a Pakistan citizen. I place no weight on the applicant’s Afghan Taskera as I have assessed this document to be a bogus document for the reasons outlined below.

21. Under the heading, “Assessment under s.91WA–Providing bogus documents or destroying identity documents”, the delegate at CB 1609 made the following finding:

The applicant has provided a bogus document as evidence of their identity, nationality or citizenship. I am satisfied that the Afghan

³³ At CB 1608

³⁴ At CB 1609

Taskera the applicant has provided to the Department as part of his SHEV application is a bogus document on the basis of the following information:

- *Country information indicates that it was not possible to obtain an Afghan Taskera outside Afghanistan in the manner described.*
- *Country information indicates that all Afghans are required to return to their family's place of residence, or to Kabul, to apply for a Taskera. I do not accept that the applicant's cousin would have been able to obtain a Taskera on the applicant's behalf in Afghanistan.*
- *The applicant did not provide his cousin with any documentation in order to obtain his Taskera. He simply told his cousin that he was 25 years of age. Country information indicates that you have to provide photographs, an application form and the applicant's father's Taskera in order to be issued with a Taskera.*
- *The applicant stated that there are people that if you pay ten thousand they organise your Taskera so that you can obtain it which is what the applicant did. Country information indicates that the processing fee for Taskera's is between 10 and 20 Afghani which is less than one Australian dollar.*

22. Footnoted to the above findings were the following items of country information:

- a) "Afghanistan: The issuance of tazkira certificates", Canadian IRB: Immigration and Refugee Board of Canada, 16 December 2011 (footnotes 9, 11, 12) (the 2011 Canadian Report); and
- b) "Afghanistan: Requirements and procedures to obtain, renew, and replace a biometric passport, both within and outside the country; validity period of passport; whether the 'place of birth' noted in the passport is the same as the one listed on the tazkira," Canadian IRB: Immigration and Refugee Board of Canada, 20 February 2017 (footnote 10) (the 2017 Canadian Report).

23. The delegate went on, at CB 1610:

After considering all the available evidence, I reasonably suspect that the applicant's Afghan Taskera is a counterfeit document as

defined by s5(1)(b) of the Act. I do not accept that it was genuinely issued by the Afghan authorities inside Afghanistan. As discussed below in the Identity Finding, the weight of evidence before me indicates the applicant is a Pakistan national.

I note that the applicant did not comment directly on the adverse information put to him regarding his Taskera. Rather the applicant provided information regarding his father's Taskera and his claimed fake Pakistan identity. I find the fact that the applicant has not commented on his Taskera indicates that the applicant does not dispute the finding that his Afghan Taskera is a bogus document.

24. On the issue of identity, the delegate then went on³⁵ to find that the applicant did not have a reasonable explanation for providing a bogus document as evidence of his identity, nationality or citizenship, and that s.91WA(1) of the Migration Act prevented the grant of a protection visa to him.
25. However the delegate, at CB 1610, then determined to make findings on the applicant's identity and protection claims on the available information.
26. Under the heading, "Identity Finding", the delegate repeated the evidence of the applicant's identity, then³⁶ made a finding that the applicant was "a member of the indigenous Hazara community in Pakistan". This was based on a number of dot points, some of which had not been referred to earlier in the decision:
 - *I have assessed the applicant's Afghan Taskera as bogus.*
 - *Country information indicates that it is not possible to obtain an Afghan Taskera while not present in Afghanistan in the manner described.*
 - *The applicant is in possession of a Pakistan identity document - Form B (title of document as per translation - Certificate of Children below 18 years of age).*
 - *The Form B (title of document as per translation - Certificate of Children below 18 years of age) is printed on NADRA paper and there is no evidence before the*

³⁵ CB 1610

³⁶ At CB 1611

department that this document is counterfeit or has been fraudulently altered or fraudulently obtained.

- *This Form B states that the applicant is born in Quetta and indicates that the applicant is a citizen of Pakistan.*
- *Country information indicates that NADRA is a competent central authority and does not support a finding that the Pakistan identity document the applicant submitted is bogus.*
- *The applicant is in possession of a Pakistan Identity Card which he has intentionally withheld from the department.*
- *The applicant's brother [AM] holds a Pakistan passport. [AM's] Pakistan passport lists his Computerised National Identity Card number (CNIC). This CNIC on the passport matches the CNIC listed on the Form B.*
- *Country information indicates that the most reliable forms of documentation in Pakistan are passports and CNICs.*
- *The applicant did not initially provide his Alias or Pakistan Form B. The applicant only provided his Pakistan Form B after adverse information was put to the applicant regarding his family composition during the SHEV interview.*
- *The applicant's explanation that his Pakistan Form is Bogus lacks credibility and is not supported by any evidence.*
- *The totality of evidence indicates that the applicant is a Pakistan citizen.*

27. The country information on Pakistan referred to at dot points 6 and 9 was footnoted by reference to a DFAT "Country Information Report: Pakistan", dated 1 September 2017 (the 1 September 2017 DFAT Report).

28. With regard to the identity of the applicant's father, the delegate found:³⁷

I do not place any weight on the applicant's father's Taskera as evidence of his identity, nationality or citizenship given the prevalence of fraudulent documents in Afghanistan. As I have accepted that the applicant has provided a genuine Pakistan identity document (Form B) which lists his father's name and CNIC Number then it follows that I do not accept that the

³⁷ CB 1611

applicant's father's Pakistani identity card is fake or that his or his father's Pakistan identity cards have lapsed or are unable to be renewed.

29. On the issue of identity the delegate made the following further findings:³⁸

I do not accept that the applicant departed Iran using a counterfeit Iranian passport and find that the applicant would have used his own genuine Pakistan passport when he travelled to Australia.

In reaching a decision on the applicant's identity I place a great deal of weight on the fact that he has provided false and misleading information regarding his biography and his identity. I have concluded that the applicant is not a credible witness.

I am not satisfied that the applicant's identity is as claimed. Having carefully considered all the evidence before me, I am satisfied that the applicant is [redacted] born ... 1990 and is a Pakistani citizen who was born in Quetta, Pakistan.

30. Under the heading, "Findings of fact", the delegate³⁹ noted that, as she had found that the applicant's identity was a named person, a Pakistan citizen, no assessment would be made against his claims as against Afghanistan. The delegate then went on to consider the applicant's claims as against Pakistan. The delegate⁴⁰ found that he did face a real chance of serious harm in Quetta; however the delegate went on to find that the applicant could reasonably relocate to other parts of Pakistan.⁴¹
31. The delegate concluded that the applicant was an Excluded Fast Track Review Applicant (EFTRA),⁴² as he had provided a counterfeit document as defined in s.5(1)(b) of the Migration Act. As a consequence, not only could he be refused a visa, but as a person who has been found to be an EFTRA, he was not entitled to merits review of the delegate's decision.⁴³

³⁸ CB 1611-1612

³⁹ At CB 1614

⁴⁰ At CB 1617-1618

⁴¹ CB 1620-1624

⁴² cf s.5(1)(a)(vi), CB 1625

⁴³ See CB 1626

The current proceedings

32. These proceedings began with a show cause application filed on 23 March 2018.
33. At the trial of this matter on 9 December 2019 (and over the Minister's objections) I granted the applicant leave to rely upon an amended application dated the same day and handed up in court.
34. The grounds in the application as amended are:

1. *The second respondent (the Tribunal) made a critical finding of fact that was unsupported by the evidence and failed to take account of evidence and submissions provided by the applicant, such that the decision was seriously lacking in foundation, rationality, and logical coherence in a way that was legally unreasonable.*

Particulars

The Tribunal's finding, at CB 1606, that a Taskera provided by the applicant must have been bogus since the applicant was not residing in Afghanistan when the Taskera was issued:

- (a) *was based on country information which did not provide an evidentiary basis for that finding; and*
 - (b) *failed to consider or to make findings on evidence provided by the applicant that his father's Taskera contained registration and serial details that were largely identical to the registration and serial details on the applicant's Taskera.*
2. *The Tribunal made a related finding of fact that was unsupported by the evidence and failed to take account of evidence and submissions provided by the applicant, such that the decision was seriously lacking in foundation, rationality, and logical coherence in a way that was legally unreasonable.*

Particulars

The Tribunal's finding, at CB 1608, that a Form B provided by the applicant was a genuine document, was based on:

- (a) *an absence of information to indicate that it was a bogus document, that finding being both illogical and*

not in accordance with the evidence provided by the applicant;

- (b) an observation that the Form B was printed on “NADRA paper”, such observation not being probative of the document being genuine;*
- (c) a match between a Computerised National Identity Card number on the Form B and a similar Computerised National Identity Card number on the passport of the applicant’s brother, when there was no evidence that this was the case.*

35. In addition to the court book filed on 12 July 2018, I have before me as evidence an additional court book filed on behalf of the applicant on 2 December 2019 containing various country information, and the affidavit of Jodie Ellen Coomber made on 2 December 2019, to which is annexed a partial transcript of a visa interview which took place on 27 April 2017.
36. I also received at the trial as an Exhibit⁴⁴ a statement of Canadian country information relating to procedures to apply for a “tazkira” from within and from outside of Afghanistan.

Consideration

Ground 1 – was there an evidentiary foundation supporting the delegate’s finding that the Taskera provided by the applicant was bogus?

Applicant’s contentions

The Taskera

37. The applicant contends that the delegate’s finding at CB 1606 that the Taskera must have been bogus since the applicant was not residing in Afghanistan when the Taskera was issued, was based on five separate items of country information, none of which provided an evidentiary basis for that finding.
38. First, at CB 1606, immediately after the finding, the delegate referred to there being “no country information which indicates that Afghan

⁴⁴ Exhibit A1

citizens can obtain Taskeras outside Afghanistan”, referring at footnote 2 to the 2016 Australian Report.

39. This observation is said to be demonstrably incorrect, the 1 September 2017 DFAT Report at [3.9] stated:

Credible sources told DFAT that Afghans are typically able to access Afghan identity documentation, including Taskeras, from the Afghan Embassy in Islamabad. DFAT was unable to obtain specific information about whether Afghans, including Hazaras, can access formal documentation through the Afghan Consulate in Quetta, but DFAT considers it plausible that they can.

40. More significantly, however, the applicant submits that, while the 2016 Australian Report did say that Taskeras are not issued from outside Afghanistan, this was not relevant to the present case, since the applicant had claimed that his Taskera was issued from *inside* Afghanistan. He had said that it was issued to his cousin, who had travelled from Quetta to Jaghori to obtain the Taskera and bring it back to Quetta.
41. Secondly, at CB 1609 the delegate stated that “Country information indicates that it is not possible to obtain an Afghan Taskera while not present in Afghanistan *in the manner described*” (emphasis added), referring at footnote 17 to the 2011 Canadian Report.
42. The applicant submits that the 2011 Canadian Report does indeed cite reports from officials at the Embassy of Afghanistan and the Canadian High Commission in Pakistan who said that Taskeras are issued by population registration departments located in 34 provinces and every district in Afghanistan,⁴⁵ and that “personal presence” is required to apply for a Taskera.⁴⁶ However the “manner described” by the applicant in obtaining his Taskera was not that he had gone through the *official* processes referred to in the 2011 Canadian Report. At the interview before the delegate the applicant had quite clearly stated that the Taskera, while genuine, had been obtained through *bribery*. As recorded at CB 1609 the applicant had said that “there are people that if you pay ten thousand they organise your Taskera so that you can obtain it”. The delegate appears to have at least acknowledged this claim by

⁴⁵ Page 1

⁴⁶ Page 2

contrasting this large amount (presumably in the Afghani currency) with country information, to be found at page 2 of the 2011 Canadian Report, that the processing fee for a Taskera is between 10 and 20 Afghani, or less than one Australian dollar.

43. The 2011 Canadian Report had nothing to say as to whether it is possible to obtain a Taskera while not present in Afghanistan “in the manner described” by the applicant; namely, by arranging for another person to pay a bribe to the issuing authority in the applicant’s home province. The 2011 Canadian Report elsewhere adverted to the possibility that a genuine Taskera could be obtained by the payment of a bribe, when at page 2 it referred to a person having had to bribe a population registration employee and use his “contacts” in order to obtain a Taskera in Kunduz province in February 2009.
44. Thirdly, at CB 1609 the delegate also referred to country information which “indicates that all Afghans are required to return to their family’s place of residence, or to Kabul, to apply for a Taskera”, referring at footnote 10 to the 2017 Canadian Report.
45. The 2017 Canadian Report does state at page 3 that all Afghans are required to return to their family’s place of residence, or to Kabul, to apply for a Taskera, and in doing so it cross-references the 2011 Canadian Report. However, the applicant contends that this too was not responsive to the applicant’s evidence. It was based on correspondence with a Senior Associate of a Kabul-based law firm⁴⁷ who largely referenced Afghan law, an independent think-tank Samuel Hall,⁴⁸ and the Norwegian Refugee Council (NRC),⁴⁹ none of whom considered the likelihood of obtaining a genuine Taskera by way of a bribe.
46. Fourthly, at CB 1609 the delegate referred again (at footnotes 11 and 12) to the 2011 Canadian Report for two further propositions; namely:
 - *The applicant did not provide his cousin with any documentation in order to obtain his Taskera. He simply told his cousin that he was 25 years of age. Country information indicates that you have to provide photographs,*

⁴⁷ See page 3

⁴⁸ See footnote 1 at page 3

⁴⁹ See page 4

an application form and the applicant's father's Taskera in order to be issued with a Taskera.

- *The applicant stated that there are people that if you pay ten thousand they organise your Taskera so that you can obtain it which is what the applicant did. Country information indicates that the processing fee for Taskera's is between 10 and 20 Afghani which is less than one Australian dollar.*

47. These references are said to suffer from the same problem as above; they did not address “the manner described” by the applicant in obtaining his Taskera through the payment of a bribe.
48. In summary, the applicant submits that the country information referred to by the delegate as the basis of the finding that the applicant had provided a bogus Taskera failed to address “the manner described” by the applicant as to how he obtained his Taskera. The country information relied on by the delegate was not probative of the applicant's Taskera being a bogus document.
49. A further issue is said to arise with regard to the delegate's finding that the Taskera was a bogus document. The applicant lodged with his application documents an English translation of his father's Taskera,⁵⁰ which contained registration and serial details that were largely reproduced on the English translation of the applicant's Taskera.⁵¹ If (as discussed below) the delegate was prepared to find that the applicant's Form B was genuine because it cross-referenced the CNIC found on his brother's Pakistan passport, the applicant asks why the delegate would not also consider that the cross-referencing of the father's registration and serial details on both his and the applicant's Taskeras be taken as evidence of the genuineness of *both* of their Taskeras? The applicant submits that it would be an extraordinary coincidence for two fraudulently obtained Taskeras to have almost identical registration and serial details. Yet the delegate gave no consideration to this evidence that the applicant's Taskera was genuine.
50. I prefer and agree with the Minister's submissions in relation to the first ground. Some preliminary observations are necessary. First, the issue in this case is not, as contended for by the applicant in the

⁵⁰ CB 1098

⁵¹ CB 72

applicant's submissions, whether there was "an error" in the finding of the delegate that the Taskera provided by the applicant was a "bogus document". The role of this Court is not to consider the correctness of that finding, if the decision in issue is a privative clause decision.⁵² Rather, the issue for the Court is whether the decision is vitiated by jurisdictional error. That in turn depends upon whether the factual finding (for that, in essence, is what the applicant seeks to challenge) was open to the decision maker.

51. In the amended application, the only direct reference in the grounds to a ground that might amount to jurisdictional error appears to be a contention that the decision was irrational or legally unreasonable. Alternatively, it might be contended that the applicant's ground seeks to argue that there was no evidence on which the findings could be made.

The no evidence ground of review

52. It is well established that if an administrative decision maker makes a finding of fact that is a "critical step in its ultimate conclusion" and there is no evidence to support that finding, this may constitute jurisdictional error.⁵³ However, as Mason CJ stated in *Bond*,⁵⁴ so long as there is "*some* basis for an inference – in other words, the particular inference is reasonably open, even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place".

53. As Murphy J explained in *MZZYE v Minister for Immigration*⁵⁵ at [54]:

...the no evidence ground of review will not be made out unless it is established that there was "no evidence, or other material, to justify the findings of fact made". The learned authors Aronson and Groves in Judicial Review of Administrative Action (Fifth Edition at 246, [4.600]) suggest that the "no evidence" ground "cuts out when even a skerrick of evidence appears".

⁵² See s.474 of the Migration Act

⁵³ See *SFGB v Minister for Immigration* [2003] FCAFC 231; (2003) 77 ALD 402 at [19], referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-357

⁵⁴ At 356

⁵⁵[2015] FCA 1378

54. Not only must there be “not a skerrick” of evidence upon which the impugned finding is based before the ground can be made out, but it is also necessary that in order for a finding made without evidence to amount not just to an error of law, but to a jurisdictional error, the finding must be either a finding in relation to a jurisdictional fact⁵⁶ or at a minimum, a finding that is a critical step in the ultimate conclusion.⁵⁷ As Perram J put it in *DRP17 v Minister for Immigration*⁵⁸ at [17], the relevant finding must go to the “core of the ... decision”.⁵⁹
55. The no evidence ground could clearly not be made out in this case: in relation to the findings about the Taskera being a bogus document, at the most general level, the delegate clearly relied, not only on the country information about a Taskera not being available to a person outside the country, but on the following:
- a) the applicant’s own evidence that he did not give his cousin any identity documents to obtain it;
 - b) the fact that the applicant had withheld but later produced Pakistan identity documents that directly contradicted the content of the Taskera;
 - c) the fact that the applicant’s brother has a Pakistani passport (and the applicant had denied that he was his brother, stating it was his cousin when asked about him at interview);
 - d) the applicant’s own evidence that there are people who you can pay to organise your Taskera;⁶⁰
 - e) the fact that in response to a s.57 letter indicating that he might be assessed as an EFTRA as he was reasonably suspected of having provided a bogus document and inviting him to respond, the

⁵⁶ See comments to that effect by Jessup J and Bromberg J respectively in *Australian Postal Corporation v D’Rozario* (2014) 222 FCR 303 at [67], [108]

⁵⁷ *SFGB* at [19]

⁵⁸ [2018] FCA 523

⁵⁹ An appeal by the Minister against this decision was dismissed by the Full Court: *Minister for Immigration v DRP17* [2018] FCAFC 198; and see also *Schmidt v Minister for Immigration* [2018] FCA 1162 at [30]-[32], and the authorities referred to at [30]

⁶⁰ See CB 1609

applicant did not comment directly on the Taskera, which was taken to indicate that he did “not dispute the finding that his Afghan Taskera is a bogus document”;⁶¹ and

- f) the general adverse credibility findings made by the delegate, based on the applicant’s later admissions that he had misrepresented his family circumstances; falsely described his brother as a cousin, and withheld the information that he held Pakistani identity documents.⁶²

56. In the Minister’s submission, that constitutes far more than the necessary “skerrick” from which an inference is available to be drawn. Counsel for the applicant conceded this in oral argument, by submitting that the first ground was not a “no evidence” challenge but an asserted lack of logically probative evidence. I consider that below in relation to Ground 2.

57. Further, if it were to be contended that there was no evidence for the finding that the applicant’s Pakistan identity document (Form B) was genuine, then the fact that the applicant’s brother has a Pakistani passport would clearly constitute evidence, combined with his own Pakistani identity document, from which such an inference could be drawn in relation to the applicant’s identity and his Pakistani identity document.

58. Thus it is apparent that the “no evidence” ground of judicial review in its traditional iteration could not succeed. As represented as an alleged lack of logically probative evidence it is indistinguishable from the irrationality alleged in Ground 2.

Challenges to the Country Information

59. As for the challenges to the country information that was relied on by the delegate,⁶³ it is well established that the choice of country information, and the weight to be given to it, is a matter for the decision maker.⁶⁴ In *NAHI* the Full Federal Court (Gray, Tamberlin and

⁶¹ At CB 1626 (referring to statutory declarations of 8 August 2017 at [3]-[7]; and 24 August 2017 at [6])

⁶² CB 1612

⁶³ See applicant’s submissions at [38]-[50]

⁶⁴ See *NAHI v Minister for Immigration* [2004] FCAFC 10 at [11]

Lander JJ) stated⁶⁵ (referring in that case to review by an administrative Tribunal):

The weight that it gives to [country] information is a matter for the Tribunal itself, as part of its fact-finding function. Such information as the Tribunal obtains for itself is not restricted to 'guidance', as the appellants submitted. It may be used to assess the credibility of a claim of a well-founded fear of persecution. It is not, as the first appellant submitted, an error of law, or a jurisdictional error, for the Tribunal to base a decision on 'country information' that is not true. The question of the accuracy of the 'country information' is one for the Tribunal, not for the Court. If the Court were to make its own assessment of the truth of 'country information', it would be engaging in merits review. The Court does not have power to do that.

60. The correctness of that judgment, including the statement that the question of the accuracy of the country information is a matter for the decision maker, has never been doubted and that passage has been frequently relied on and cited with approval by the Federal Court.⁶⁶
61. Thus the detailed attempt by the applicant to persuade the Court that the country information relied on by the delegate was not accurate does not rise above the level of an impermissible attempt to challenge the factual findings of the delegate. While the applicant contends in some detail that the country information did not support the findings made, he has not indicated how reliance on it, particularly in light of what was said by the Full Federal Court in *NAHI*, could amount to jurisdictional error, unless irrationality were to be established.

Ground 2 – irrationality

Applicant's contentions

The Form B

62. The Pakistani Form B was found by the delegate at CB 1608 to be a genuine document on the following evidence.

⁶⁵ At [11]

⁶⁶ See for example *SZUEP v Minister for Immigration* [2017] FCAFC 94 at [27]; *VQAB v Minister for Immigration* [2004] FCAFC 104 at [26]; *AZAFV v Minister for Immigration* [2016] FCA 79 at [24] (Perry J); *BPC16 v Minister for Immigration* [2018] FCA 920 at [62]-[63] (Kerr J)

63. First, the delegate at CB 1608 said that “There is no information before the department to indicate that the Pakistan Form B that the applicant provided is a bogus document”.
64. The applicant contends that this observation says nothing about the genuineness of the Form B. An *absence* of information about a state of affairs, particularly where there is no evidence that any effort was made to investigate the state of affairs,⁶⁷ does not establish that the state of affairs exists. The absence of information to indicate that the Form B was a bogus document did not provide an evidentiary basis for the proposition that the document was genuine.
65. Secondly, the applicant contends that there *was* evidence before the delegate that the Form B was a bogus document. A cursory examination of the English translation of the Form B⁶⁸ ought to have raised for the delegate a number of questions as to its genuineness. Thus:
 - a) the list of the applicant’s siblings in the Form B was nothing like the list of his siblings given in his statutory declaration of 9 May 2017 at [11].⁶⁹ Only two of his claimed siblings, MQ and MJ, were included in both documents. Neither did the birthdates on the Form B match the birthdates in the list of the applicant’s siblings given in his statutory declaration; and
 - b) one of the brothers on both documents, MQ (the married brother living in Adelaide), was said by the applicant in his statutory declaration of 9 May 2017 at [32]⁷⁰ to be the same person as JA on the Form B. the applicant asks if that is so, how did this account for the “second” MQ in the Form B?
66. Thirdly, the delegate at CB 1611 dot points 4 and 6 said that the Form B was printed on “NADRA paper” and there was no evidence before the Minister’s Department that this document was counterfeit or had been fraudulently altered or fraudulently obtained, and that the

⁶⁷For example, by having the “original Form B” (CB 1609) assessed by the Minister’s Department’s well-known Document Examination Unit

⁶⁸CB 797

⁶⁹CB 792

⁷⁰CB 794

National Database and Registration Authority (NADRA) of Pakistan is a competent central authority.⁷¹

67. The applicant contends that this observation again refers to the absence of evidence which has been referred to above. In addition, it is not apparent exactly what the delegate was referring to with the term, “NADRA paper”. If the delegate was referring to a particular form of paper, there is no evidence of what this type of paper is or was. If the delegate was merely referring to the fact that the document had a NADRA letterhead, this would not be probative of the document being genuine; common sense suggests that any proficient counterfeit would have the letterhead of the claimed source of the document.
68. Fourthly, the delegate at CB 1611 observed that the applicant’s brother, AM, had a Pakistan passport listing his CNIC number which matched the CNIC listed on the Form B, and country information indicated that the most reliable forms of documentation in Pakistan are passports and CNICs.
69. The applicant asserts that this proposition cannot be tested because the Minister has not produced the copy of the passport allegedly held by AM. The applicant submits that in the absence of this evidence the Minister is unable to make good the claim that the CNIC numbers on the Form B and the passport of AM were the same.
70. Finally, the applicant submits that it needs to be noted that, even if the delegate’s finding that the Form B was genuine was not affected by jurisdictional error, this will not undermine the effect of error in the finding that the applicant’s Taskera was bogus. An intact finding that the Pakistani Form B was genuine would not render the remittal of this matter futile, since there is nothing in the evidence to suggest that the applicant could not have obtained a genuine Taskera (albeit by bribery) while still holding a genuine Pakistani Form B.

⁷¹See CB 1620

Resolution

Legislative provisions

71. Part 7AA of the Migration Act provides for a limited form of review of certain decisions identified as fast track decisions. Some applicants, known as “excluded fast track review applicants”, are excluded from the fast track review process.

72. An “excluded fast track review applicant” is relevantly defined in s.5(1) as a fast track applicant:

(a) *who, in the opinion of the Minister:*

...

(vi) *without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application*

73. Section 5(1) of the Migration Act relevantly provides that a “bogus document”:

...means a document that the Minister reasonably suspects is a document that:

(a) *purports to have been, but was not, issued in respect of the person; or*

(b) *is counterfeit or has been altered by a person who does not have authority to do so; or*

(c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

74. Section 91WA of the Migration Act relevantly provides as follows:

(1) *The Minister must refuse to grant a protection visa to an applicant for a protection visa if:*

(a) *the applicant provides a bogus document as evidence of the applicant’s identity, nationality or citizenship...*

(2) *Subsection (1) does not apply if the Minister is satisfied that the applicant:*

(a) *has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and*

(b) *either:*

(i) *provides documentary evidence of his or her identity, nationality or citizenship; or*

(ii) *has taken reasonable steps to provide such evidence.*

The issue

75. The issue in this case is whether there was any jurisdictional error in the finding of the delegate that the Taskera provided by the applicant was a “bogus document”. If there was no such error in this finding, then the delegate was under no obligation to consider the application for protection, since under s.91WA the delegate was bound to refuse the application.⁷²

76. The definition of “bogus document” in s.5(1) of the Migration Act requires a determination of whether there was any error in the delegate’s “reasonable suspicion” that the Taskera met the requirements of *either* subparagraphs (a), (b) *or* (c) of the definition; namely, that it purported to have been, but was not, issued in respect of the applicant, that it was counterfeit or altered without authority, or that it was obtained because of a false or misleading statement.

77. The question of whether the applicant had a “reasonable explanation” for providing a bogus document, under s.91WA(2)(a) of the Migration Act, is not in issue in this case since he denied that he had given a bogus document.

78. “Reasonable suspicion” of something is said to be something less than actual belief of the thing, though it is more than mere conjecture or surmise.⁷³ It is open to the Court to examine the factual basis upon

⁷² See, e.g., *ASF17 v Minister for Immigration* [2018] FCA 1149 at [42] (Banks-Smith J)

⁷³ See *George v Rockett* (1990) 170 CLR 104 at 115-116

which the delegate concluded that she “reasonably suspected” the Taskera fell within one of the paragraphs of the definition of “bogus document”.⁷⁴

79. In the present case the basis upon which the delegate found the applicant’s Taskera to be a bogus document appeared to have two limbs:
- a) on the one hand, the delegate found that the Taskera must have been bogus since the applicant was not residing in Afghanistan when the Taskera was issued;
 - b) on the other hand, the delegate found that the Pakistani Form B was a genuine document because of country information, and because the applicant’s brother, AM, had a Pakistan passport listing his CNIC number which matched the CNIC listed on the applicant’s Form B.

A jurisdictional fact?

80. An important question in this case is whether the status of the applicant’s Taskera as a bogus document, or the statutory consequence of that status is a jurisdictional fact. The Minister relies on the Full Federal Court decision in *Minister for Immigration v Brar*⁷⁵ at [49]-[51] where the Full Federal Court stated:

The Full Court of this Court considered the question of what facts are jurisdictional facts under ss 108 and 109 of the Act in SHJB v Minister for Immigration and Multicultural Affairs [2003] FCAFC 330 (“SHJB”). The principal question before the Court was whether the fact of non-compliance by a visa holder in the way described in the notice was a jurisdictional fact so that a Court hearing an application for judicial review must decide the fact for itself. The Court answered that question in the negative and said that the relevant jurisdictional fact was a decision by the Minister that there was non-compliance by the holder of the visa with the requirements of s 108. The Minister or Tribunal’s decision could be attacked on the basis that it was not supported by some probative material or logical grounds. The Court’s

⁷⁴ See, eg, *Sun v Minister for Immigration* (2016) 243 FCR 220 at [83] (Flick and Rangiah JJ)

⁷⁵ (2012) 201 FCR 240

reasons for reaching those conclusions were as follows (at [14]-[22]):

The first [ground of appeal] was that the question of non-compliance with s 101 was a ‘precedent fact’, which, on review, should be determined by the Court. The appellant submitted that the learned primary judge had erred in failing to hold that the actual existence (as opposed to the Tribunal’s ‘mere satisfaction’) of non-compliance by him was a condition upon which the Tribunal’s jurisdiction under s 109 depended. That is, that the fact of non-compliance was a ‘jurisdictional fact’. The appellant contended that the primary judge should have determined for himself, on the admissible evidence before the Court, whether there had been ‘non-compliance by the visa holder in the way described in the notice’.

Counsel for the appellant then took us to the authorities relating to situations in which a Court, on judicial review, was obliged to determine for itself the jurisdictional fact upon which the administrative decision-maker’s jurisdiction depended.

It seems to be common ground, and we agree, that the principles in this area are well established. It is sufficient to refer to Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135.

However, in our view the appellant has wrongly identified the jurisdictional fact which gives rise to the power conferred by s 109(1). In our opinion, the relevant jurisdictional fact is to be found by a proper construction of ss 108(b) and 109(1)(a). The jurisdictional fact is a decision by the Minister that there was non-compliance by the holder of the visa with the requirements of s 108. That decision gives rise to the power to cancel the visa.

That fact (the decision that there was non-compliance with s 101) is probably “a fact” which falls outside the ordinary meaning of that term, to use the words of Gummow J in Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at [130]. As his Honour pointed out in the immediately following paragraphs, such a decision is reviewable under s 75(v) of the Constitution.

But in conducting such a review, the Court’s function is not to decide, as the appellant submits, whether he did in fact

fail to comply with s 101. In that regard, this case differs from the statutory regime in Enfield, where the relevant power (one untrammelled by the requirement of consent from the local council) simply did not exist if the proposed development was for 'special industry' – see the joint judgment at [33] to [39].

Similarly, in Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55, a decision on which the appellant relied quite heavily, the jurisdictional fact was whether the relevant development was '... likely to significantly affect threatened species, populations or ecological communities, or their habitats ...'. In such circumstances, s 77(3)(d1) of the Environmental Planning and Assessment Act 1979 (NSW) required the development application to be accompanied by a species impact statement. The New South Wales Court of Appeal so held, as a matter of statutory construction, noting that the decision about the existence or not of a jurisdictional fact may (as in that case) involve the exercise of judgment. But the existence of the jurisdictional fact was to be ascertained objectively; the opinion of the consent authority was not determinative: see Spigelman CJ (with whom Mason P and Meagher JA agreed) at [81] to [94].

We would distinguish the present case from Timbarra, because the statutory requirements are expressed in a basically different manner. Parliament has decided that the jurisdictional fact is not whether the appellant failed to comply with s 101, but whether the respondent's officer or the Tribunal had decided that there was such non-compliance.

The first question in this appeal is whether his Honour erred in finding that there was material before it that justified the Tribunal's conclusion. Or, to adapt the language of Gummow J in Eshetu at [145], was the satisfaction of the Tribunal based on findings or inferences of fact which were not supported by some probative material or logical grounds? In our view, the answer to both questions is no. One has only to refer to the material from the Organisation for Registration and the Directorate of Registration of the Ministry of Interior of the Government of Pakistan and compare that with some of the information given by the appellant in his application for a protection visa about the names of some of the members of his immediate family. The appellant criticised the official records from Pakistan as

containing some inconsistencies. In our opinion, those criticisms go, impermissibly, to matters of weight or the merits. There was plenty of other information upon which the Tribunal relied and upon which it was, in our view, entitled to rely.

In our respectful opinion the reasoning of the Court in SHJB is correct and there is no reason why its conclusions should not be followed by this Court.

The question of whether the bogus document was given, presented or provided to an officer or to an authorised system is not a jurisdictional fact. It is part of the issue of non-compliance and in the same way as the question of whether a document is a bogus document is not a jurisdictional fact (SHJB) so also is the issue of the person or entity to whom the document was given not a jurisdictional fact.

81. On the other hand, counsel for the Minister referred me to the decision of the Full Federal Court in *BGM16 v Minister for Immigration*⁷⁶ at [28] where the Full Federal Court stated:

The text of s 91WA may suggest that s 91WA(1)(a) is a jurisdictional fact, especially when read in contrast to the language of satisfaction used in s 91WA(1)(b). See generally Timbarra Protection Coalition Inc v Ross Mining NL [1999] NSWCA 8; 46 NSWLR 55 at [36]-[44] (Spigelman CJ) and Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; 199 CLR 135 at [45]-[50] (Gleeson CJ, Gummow, Kirby and Hayne JJ). Senior counsel for the Minister accepted this and submitted that characterisation would be consistent with s 487ZI, which we deal with below.

82. In view of the potential significance of the issue, and the limited oral argument on it, I acceded to a request from the Minister's solicitors to consider post hearing submissions on the issue. The Minister relevantly submits as follows.
83. The Full Federal Court in *Brar* referred to and applied the Full Federal Court's earlier decision in *SHJB v Minister for Immigration*⁷⁷ at [49], notably extracting [14]-[22] in the Court's reasons in *Brar* at [49]. *SHJB* in turn relied on the High Court's exposition of jurisdictional

⁷⁶ [2017] FCAFC 72

⁷⁷ (2003) 134 FCR 43

facts in *Corporation of the City of Enfield v Development Assessment Commission*.⁷⁸ In *SHJB*, the Full Federal Court identified as the relevant jurisdictional fact “a decision by the Minister that there was non-compliance ... with the requirement of s.108” of the Migration Act at [17], and indicated at [19] that the Court’s function was not to decide whether the applicant did in fact fail to comply with s.101.

84. Relevantly, in relation to this matter, at [22] the Full Federal Court in *SHJB* had found that the applicant’s criticisms of the official records from Pakistan as containing inconsistencies went to weight or the merits (by contrast with jurisdictional error). In *Brar*, the Full Federal Court concluded at [51]:

The question of whether the bogus document was given, presented or provided to an officer or to an authorised system is not a jurisdictional fact. It is part of the issue of non-compliance and in the same way as the question of whether a document is a bogus document is not a jurisdictional fact (SHJB) so also is the issue of the person or entity to whom the document was given not a jurisdictional fact.

85. It therefore follows that in reliance on *SHJB* and *Brar*, the factual finding that the applicant provided a bogus document for the purpose of his protection visa application is reviewable by the Court only on the basis of an identified jurisdictional error.

86. The applicant has provided the Court and the Minister with a copy of the decision in *BGM16 v Minister for Immigration*⁷⁹ and drawn the Court’s attention to what is said at [28]. In sharp factual contrast with this case, in *BGM16* there was no factual dispute about whether the applicant had provided a false document: he conceded that he had entered Australia using a Greek passport he had purchased in Greece.⁸⁰ He also clearly admitted to having used a number of other bogus documents in later years,⁸¹ but when he applied for a protection visa, he claimed to have used his own Albanian identity documents⁸² and he contended that s.91WA did not apply to him because, as the Full

⁷⁸ (2000) 199 CLR 135

⁷⁹ (2017) 252 FCR 97

⁸⁰ see [16]-[18]

⁸¹ see [19]-[21]

⁸² at [22]-[23]

Federal Court accepted at [24], he “did not provide any bogus documents as evidence of his identity, nationality or citizenship as part of his protection visa application, or in connection with it”.

87. Thus the issue involved the interpretation of s.91WA and its reach, including its temporal reach.⁸³ It was in that context that Mortimer and Wigney JJ stated at [28] that “The text of s.91WA may suggest that s.91WA(1)(a) is a jurisdictional fact”. It is apparent from the reasons for decision that that matter was not the subject of argument, albeit it is noted in that paragraph that senior counsel for the Minister accepted that it may be, but the Court did not decide the point, nor did it need to do so, as there was no factual dispute in that case. Notably, the Court did not refer to its earlier decision in *Brar*. Thus on the issue of whether s.91WA(1)(a) is a jurisdictional fact, the Minister submits, that in accordance with the reasoning of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁸⁴ at [132]-[133], that proposition could not constitute binding authority as the matter was not pleaded or argued.⁸⁵
88. In this case, the applicant did not plead or argue that whether a bogus document was provided was a jurisdictional fact until the matter was raised by the Court. Nor was that matter the subject of any pre-hearing written submissions. Rather, it was addressed (albeit briefly) only at the hearing.
89. Returning to *BGM16*, not only was the jurisdictional fact point clearly not argued or decided in that case, but the Full Federal Court did not, as noted above, refer to the earlier decisions in *SHJB* and *Brar*. While it is clearly open to the Full Federal Court to decline to follow a previous decision of that Court, it is well established that the Court will do so only when the previous decision is “plainly wrong”.⁸⁶ There is nothing

⁸³ see *BGM16* at [13]

⁸⁴ (2007) 230 CLR 89

⁸⁵ see *Farah* at [132]

⁸⁶ see for example *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at [26]- [31]; *SZEEU v Minister for Immigration* (2006) 150 FCR 214 at [8], [146]-[149] and [187]-[192]; *AEK15 v Minister for Immigration* (2016) 244 FCR 328 at [27]; *Taulahi v Minister for Immigration* (2016) 246 FCR 146 at [173]; and *Ashraf v Minister for Immigration* (2018) 261 FCR 97 at [64]

in *BGM16* that would suggest that the Full Federal Court had considered, but decided not to follow, the decisions in *SHJB* and *Brar*.

90. Nor is there any decision of the Federal Court or the Federal Circuit Court which has held that the issue of whether a bogus document has been provided for the purpose of a protection visa is a jurisdictional fact.⁸⁷
91. For these reasons, the Minister submits that what is stated at [28] of the decision in *BGM16* does not constitute binding and authoritative precedent on the issue of whether the fact that a bogus document has been provided for the purpose of a protection visa application is a jurisdictional fact.
92. The rationality of the delegate's reasoning, and the factual conclusions reached are debatable. That is not enough, however, to establish jurisdictional error. In my view, while reasonable minds may differ about the delegate's reasoning and fact finding, the decision does have a rational basis that was open on the material before the delegate.
93. As for the contention that the finding that the "Taskera provided by the applicant must have been bogus since the applicant was not residing in Afghanistan" when it was issued amounts to a decision that was "seriously lacking in foundation, rationality, and logical coherence in a way that was legally unreasonable" it is possible that the finding itself is the basis of the ground, or it is said that it led to a decision (to refuse the visa) that was legally unreasonable.
94. In *Minister for Immigration v SZMDS*,⁸⁸ the High Court set a high threshold for findings of irrationality or illogically.⁸⁹
95. As Crennan and Bell JJ stated in *SZMDS* at [135]

⁸⁷ see for example *AIB16 v Minister for Immigration* (2017) 254 FCR 457; *BMK18 v Minister for Home Affairs* [2019] FCA 189; *BYE17 v Minister for Immigration* [2019] FCA 441; *ADT16 v Minister for Immigration* [2018] FCA 1198; *ASF17*; *AYZ18 v Minister for Home Affairs* [2019] FCCA 2070

⁸⁸(2010) 240 CLR 611

⁸⁹see also *Gupta v Minister for Immigration* [2017] FCAFC 172 at [34]-[36]; *DAO16 v Minister for Immigration* (2018) 258 FCR 175; [2018] FCAFC 2 at [30](5) where the Full Court noted that what must be established is "extreme illogicality"

A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

96. Most recently, in *Minister for Immigration v SZVFW*,⁹⁰ the High Court described the test for unreasonableness as “stringent” at [11] and “extremely confined”⁹¹ and see also *Vo v Minister for Home Affairs*⁹² at [43].
97. The Minister submits and I accept that while there is certainly room for debate about the quality of the reasoning adopted and the correctness of the conclusions reached, it cannot be said that the decision made was one that was beyond the scope of the delegate’s “decisional freedom ... within which minds might differ”.⁹³ Moreover, as Griffiths J also stated in *Stretton* at [74], “to describe reasoning as unreasonable or irrational may merely be an emphatic way of disagreeing with it”.⁹⁴ I accept that there was an “evident and intelligible justification”⁹⁵ for the delegate’s finding, with which, as is apparent, the applicant emphatically disagrees.
98. Neither of the two authorities referred to by the applicant in relation to “reasonable suspicion”⁹⁶ is apposite. *George v Rockett* involved a criminal prosecution, carrying with it a burden of proof of beyond reasonable doubt (and of course, concerned an entirely different statutory context). *Sun* was an unsuccessful challenge to a finding that the applicant was precluded from being granted a protection visa because of s.91WA. While it also involved “reasonable suspicion” about the provision of a bogus document, that case also required the Court to consider a different provision, namely, Public Interest

⁹⁰[2018] HCA 30

⁹¹ [52]

⁹² [2019] FCAFC 108

⁹³ See *Minister for Immigration v Stretton* (2016) 237 FCR 1 at [5] per Allsop CJ

⁹⁴ Referring to *Ex Parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 at [5] per Gleeson CJ and *Minister for Immigration v SZJSS* [2010] HCA 48; (2010) 243 CLR 164 at [34]

⁹⁵ Cf *Minister for Immigration v Li* (2013) 249 CLR 332 at [76]

⁹⁶ At [37] of the applicant’s submissions

Criterion 4020. A key legal issue in that case concerned the standard of proof to be applied by the Tribunal (the applicant in that case was not a fast track applicant, and thus had access to merits review). The Full Federal Court rejected any contention that the Tribunal was required to make a “determination” about the document, as opposed to reaching a state of satisfaction.⁹⁷ At [38], their Honours noted that a statutory requirement that a decision maker be “satisfied, ... leaves to the decision-maker a freedom to make such a decision as he considers appropriate - but a decision reached in accordance with law.”

99. I conclude that nothing stated by the Full Federal Court in *Sun*, at [83] or elsewhere, provides a basis upon which this Court can decide for itself whether the decision of the delegate was factually erroneous, absent some clearly identifiable jurisdictional error. While such error is clearly arguable on the facts of this case, on balance, I find that it has not been established.

Conclusion

100. The applicant has failed to establish that the decision of the delegate is affected by jurisdictional error. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.
101. I will hear the parties as to costs.

I certify that the preceding one hundred and one (101) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 19 March 2020

⁹⁷ See per Flick and Rangiah JJ at [37]